Supreme Court, U. S.
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In The
Supreme Court of the United States
October Term, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,
Petitioners,

v.

BRIAN F. WEBER, et al.,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

BRIAN F. WEBER, et al.,
Respondents.

MOTION FOR LEAVE TO SUBMIT BRIEF AND BRIEF *AMICUS CURIAE* OF THE NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO

Jerome Tauber,
Attorney for National Union of Hospital and Health Care Employees RWESU, AFL-CIO
380 Madison Avenue, New York, NY 10017
(212) 867-2100

Sipser, Weinstock, Harper, Dorn & Leibowitz
380 Madison Avenue, New York, NY 10017
Of Counsel.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO SUBMIT BRIEF
AS AMICUS CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court

Pursuant to Rule 42(3) of the Rules of this Court, the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (hereinafter the "National Union") moves this Court for leave to file the accompanying brief as Amicus Curiae in support of the Petitioners. In support of the motion, the National Union shows as follows:

1. NATURE OF THE APPLICANT'S INTEREST.

The National Union is a labor organization which represents approximately 100,000 health care employees in over 350 health care institutions. The vast majority of the National Union's members, particularly in the non-skilled service positions, are non-white. Tne two districts within the National Union, District 1199-New York and District 1199-C-Philadelphia, have negotiated union-management training funds pursuant to Section 301(c)(6) of the Labor-Management Relations Act of 1947, 29 U.S.C. §186(c)(6). These Funds are jointly managed by an equal number of Union and management trustees and are funded by collectively bargained employer contributions.

One of the goals of these training funds is to provide opportunity for advancement of minorities into the skilled technical and professional jobs

through training programs, tuition grants and remedial educational programs. The health care industry in New York and Philadelphia has had in the past an extreme overrepresentation of non-white employees in the non-skilled service jobs and an extreme underrepresentation in the skilled technical and professional jobs. It is the belief of the National Union that these Training Funds have helped lessen this racial imbalance.

As the affirmative action policies and practices of the National Union, as well as the Training Funds, may be seriously affected by the decision in this case, the National Union is vitally concerned and interested in this appeal. The interests of amicus are more fully set forth in the Statement of Amicus Interest contained in the annexed brief.

2. AMICUS' QUALIFICATION.

Because of its interest in issues pertaining to matters of great public concern in the area of labor relations and civil rights, the National Union submitted briefs Amicus Curiae to this court in other cases including the recent case of Beth Israel Hospital v. NLRB, No. 77-152. The National Union itself has has been a direct party to numerous cases before the Federal appeals courts including this court. See,

e.g., National Union of Hospital and Health Care Employees v. Carey, 557 F.2d 278 (2nd Cir. 1977).

3. THE NEED FOR THE NATIONAL UNION AS AMICUS.

The National Union's unique vantage point as a labor organization which represents primarily non-white unskilled health careworkers and which maintains established industry-wide training and upgrading funds will be of unquestionable assistance to the court in deciding the issues raised in this case.

4. REQUEST FOR CONSENT TO SUBMIT.

On January 16, 1979, the National Union requested the consent of petitioners and respondents to submit a brief Amicus Curiae. To date, no response has been received.

WHEREFORE, it is respectfully moved that the National Union be granted leave

to file the accompanying brief Amicus Curiae in this case.

Dated:

New York, N.Y.
January 18, 1979

Respectfully submitted,

JEROME TAUBER
Attorney for Movant,
National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO
380 Madison Avenue
New York, N.Y. 10017
(212) 867-2100

SIPSER, WEINSTOCK
HARPER, DORN &
LEIBOWITZ
380 Madison Avenue
New York, N.Y. 10017
(212) 867-2100
Of Counsel

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BRIEF AMICUS CURIAE OF THE NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO

JEROME TAUBER,
Attorney for National
Union of Hospital and
Health Care Employees,
RWDSU, AFL-CIO
380 Madison Avenue
New York, N.Y. 10017
(212) 867-2100

SIPSER, WEINSTOCK,
HARPER, DORN & LEIBOWITZ
380 Madison Avenue
New York, N.Y. 10017
Of Counsel.

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AMICUS CURIAE BRIEF OF THE NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO.

STATEMENT OF AMICUS INTEREST

This brief is submitted by the National Union of Hospital and Health

Care Employees, RWDSU, AFL-CIO ("National Union"), on behalf of the petitioners.

The National Union is a labor organization which represents approximately 100,000 health care employees in over 150 health care institutions. The majority of the National Union's members, particularly those employed in non-skilled service positions, are non-white.

In the early 1950's, the major hospitals in New York City were virtually unorganized. Wages for service employees as low as $35 per week were not uncommon. The service jobs were occupied primarily by non-white persons while the skilled positions were occupied almost entirely by white workers.

In 1958, the National Union's predecessor, Local 1199, Drug and Hospital Union, AFL-CIO, began a massive organiing campaign of hospitals in New York City. The campaign began at Montefiore Hospital in New York City and resulted in a now historic election victory and collective bargaining agreement. At that time, health care employees were excluded from the protection of both the National and New York State Labor Relations Acts,* and were not afforded

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* New York Labor Law §701 et seq.; National Labor Relations Act, 29 USC §151, et seq.

the right to join a union through a State or National Labor Relations Board election. One of the primary goals of the union at that time was the right of hospital workers to vote in a union election. After the agreement was reached with Montefiore, the campaign spread to other major hospitals and finally resulted in the first major strike of hospitals in labor history.

This historic strike ushered in the era of unionization of hospital workers. The Union's early goals of organizing in New York's major hospitals, were met and in 1963 the New York State Labor Relations Act was amended to include coverage of health care employees. Within a period of 10 years after the first historic victory for hospital workers the Union achieved its goals of a $100.00 minimum weekly wage and of an employer contributed pension and welfare plan. To date, the National Union has organized over 80,000 health care workers in the New York City and Philadelphia areas alone, the vast majority of whom are non-white.

In addition to the goals with regard to wages, pensions and welfare, the Union undertook to affirmatively remedy the racial imbalance in the unskilled as opposed to the skilled level jobs. The Union is divided into two divisions, the Hospital Division, which represents unskilled service and maintenance hospital employees, and the Guild Division, which represents technical and professional hospital employees. The unskilled service employees were in 1968 predominantly non-white, whereas the skilled

technical and professional employees were predominantly white. In order to remedy this inequality and to provide an opportunity for the Union's non-skilled members to achieve the skills needed for promotion to the numerous technical and professional level jobs, the Union in 1969 established through voluntary collective bargaining, the Hospital League-Local 1199 Training and Upgrading Fund.* A similar Fund was negotiated in Philadelphia in 1974.

Both Funds were formally established by an "Agreement and Declaration of Trust", both of which embody the goals and objectives of the Funds. A Board of Trustees, comprised of an equal number of Union and Employer representatives, was then established to administer the Funds. Each Fund is administered by a separate Board.

The purpose of the Funds are spelled out in Article III of the Agreement. "The purpose of the Trust Fund, among other things, shall be . . . to plan for, develop, establish and implement programs and procedures for the training, re-training, education and upgrading of employees, to the end that existing shortages of health care personnel may be alleviated and employees may have increasing opportunities for improvement, promotion, advancement, and upgrading . . . and to provide increased employment opportunities, training and upgrading in the health care industry and to recruit employees therefor. . . ."

Both Training and Upgrading Funds

---

* Now known as the Hospital League-District 1199 Training and Upgrading Fund.

recognize the fact that many hospital and nursing home employees have a vast amount of on-the-job experience and skills, but lack the formal education needed for advancement due in many cases to the lack of educational opportunities and under-priviledged backgrounds attributable to race and national origin. Over 60% of the current participants in Fund programs are non-white. The Funds have been established to provide the education these employees are lacking. Some employees of high ability are locked into dead-end jobs because they simply lack the required High School Diploma needed for advancement and/or promotion. The Funds are also committed to help them overcome this obstacle. In short, the Hospital League/District 1199 Training and Upgrading Fund and the Philadelphia Hospital and Health Care - District 1199C Training and Upgrading Fund exist to meet the whole range of educational needs of their member-employees in the Hospital-Health Care Field. The overriding goal and commitment of the Training and Upgrading Funds are to put an end to dead-end jobs by affirmatively undoing the effects of societal discrimination against minorities and the poor.

The Hospital League/District 1199 Training and Upgrading Fund was established on July 1, 1969 by contractual agreement between District 1199 (then Local 1199) National Union of Hospital and Health Care Employees, RWDSU/AFL-CIO and the League of Voluntary Hospitals and Homes of New York. At the time of its inception it covered only League Institutions; subsequently a Training Fund clause has been written into

virtually every New York City contract (including Westchester, Long Island and New Jersey) as a result of which the Fund now receives support from some 120 health care institutions in the Metropolitan Area and covers approximately fifty (50) thousand members.

The Fund is supported by a 1% contribution made by management based upon gross payroll. It is governed by a Board of Trustees consisting of fourteen members seven Union Trustees and seven Hospital Trustees. Its income in the fiscal year 1977-1978 was approximately 5.4 million dollars. The mandate of the Fund is to break the chain of deadend jobs that have traditionally plagued the health care industry. This is a pioneering effort in an industry that traditionally has never made provisions for workers to move upward without going back to school to "gather" another credential or diploma. In order to fulfill its mandate the Fund has had to develop programs (frequently by trial and error) that prepare working members of District 1199 to acquire skills they may never have acquired while in school, or to give them an opportunity to "brush up" on skills they may have lost since leaving school. The Fund runs a variety of Remediation programs for this purpose. Members come to Remediation on their own time to prepare to go into full time programs.

Once accepted into a full time program the member is released from his (her) job on a leave of absence. They are allowed to go to school free from the pressures of work, receiving a stipend from the Fund

equivalent to 85% of their net salary (with a maximum of $150.00 per week), the Benefit and Pension Fund coverage for the member, tuition, books and uniforms are also paid. Upon graduation, the members' institution is obligated to take them back in their old position and to offer them a position in their new category as soon as one is available. The cost to the Fund to support a full time student is approximately $11,000.00 per year. Because a student receives virtually full support, this is an extremely expensive program to operate and a very large investment is made in each student. In practice, approximately 90% of the Fund's graduates go back to their original institution.

The Remediation Program includes 2 basic components at present, both designed to prepare member-employees for advance college level study or, more specifically, to provide an opportunity for educationally disadvantaged members to participate in advanced studies under the Training and Upgrading Fund.

The two basic courses are: (1) the ABE/GED Program which prepares members for the High School Equivalency Diploma, and (2) the Post High School Refresher which is designed to reinforce the basic academic skills of high school graduates, seeking admission to college/level, allied health programs.

The National Union believes that the Training and Upgrading Funds are largely responsible for lessening the racial

imbalance in the skilled, technical, and professional positions in health care institutions in the New York area. While the percentage of non-white persons employed in the skilled positions is still low as compared to the percentage of non-white persons employed in industry in the New York City area, the discrepancy has been vastly reduced since the National Union's efforts at training and upgrading began in 1969.

These voluntary programs resulted from private voluntary collective bargaining. They are a tribute to what labor and management may achieve if allowed to implement voluntary affirmative action programs. This Court's decision may have a profound impact on the policies of the Training Funds administered by the National Union. The achievements of the Training Funds in advancing minorities into skilled technical and professional positions in the health care industry may be undone if this Court hampers such efforts by affirming the court below. Model programs for affirmative action in integrating skilled job categories collectively bargained in good faith should not only be approved by this Court, but lauded by it.

STATEMENT OF THE CASE

Amicus will not burden the Court with a restatement of the facts but rather, endorses the statement contained in petitioners' briefs. Amicus further joins in and endorses the statement and arguments contained in the brief amici curiae of the Affirmative Action Coordinating Center, et al.

ARGUMENT

AN EMPLOYEE TRAINING AND UPGRADING PROGRAM DESIGNED TO AID MINORITIES IN ACHIEVING HIGHER LEVEL AND SKILLED POSITIONS ESTABLISHED THROUGH GOOD FAITH UNION-MANAGEMENT COLLECTIVE BARGAINING IS NOT VIOLATIVE OF TITLE VII.

Thiscase involves two Federal Policies of equal stature, the policy of promoting private voluntary resolution of industrial disputes through the collective bargaining process expressed in the Labor-Management Relations Act of 1947, 29 U.S.C. §141 et seq. ("LMRA') and the policy of achieving equal opportunity in employment for minorities expressed in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII"). Both of these Federal Policies would be furthered by a reversal of the court below and would be hindered by affirmance.

The labor-management policy which has perhaps been most consistently and uniformly approved by this Court since the enactment of the LMRA is that union and management should be free to voluntarily engage in good faith collective bargaining in order to resolve their disputes and reach agreement on terms and conditions of employment. Textile Workers v. Lincoln Mills,

353 U.S. 448 (1957); United Steelworkers v. American Mfg. Co., 363 U.S. 565; United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574; United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593; Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235.

So long as the union represents all employees in the bargaining unit fairly and in good faith, the courts may not interfere in the voluntary bargaining process. Vaca v. Sipes, 379 U.S. 650. The union need not bargain identical terms and conditions for all employees. Good faith consideration of social factors may allow a union to seek preferential treatment in promotional opportunities for a particular group. Ford Motor Co. v. Huffman , 345 U.S. 330. The creation of a training and upgrading program negotiated in good faith to eliminate an observed racial imbalance in skilled job categories is exactly the type of privately negotiated program that federal labor policy seeks to promote. Indeed, Section 302(c)(6) of the LMRA, 29 U.S.C. §186(c)(6) excepts from its criminal provisions monies contributed to jointly managed trust funds established for the purpose of financing employee training programs. As pointed out in the Statement of Amicus Interest, the National Union has established Union-Management Training and Upgrading Funds which finance training programs for employees who seek to learn the technical and skilled occupations in the health care field. Currently approximately

60% of the employees funded by the Training and Upgrading Fund are non-white. The Training and Upgrading Fund has been a major factor in training minorities for technical jobs in an industry in which minorities have been traditionally overrepresented in the lower level service and maintenance jobs while being highly overrepresented in the technical and professional jobs. The Training and Upgrading Fund has trained minority employees for a variety of technical and professional positions in health care and has played a major role in bringing a racial balance to these higher level and higher paying positions. Such collectively bargained affirmative action training programs may be jeopardized by an affirmance of the decision below. Amicus has striven to eliminate the relics of slavery and discrimination from the health care industry through the negotiation of training funds and increased promotional opportunities for its members, the vast majority of whom are non-white. Amicus opposes the attempted misuse of progressive social legislation such as Title VII to interfere with good faith attempts on the part of union and management to eliminate racial imbalances in the work place through voluntary private collective bargaining.

Title VII was intended by Congress to continue the favored process of voluntary private resolution of disputes through collective bargaining. To

this end, Congress specifically provided that Title VII does not mandate a union and an employer to either grant or deny preferential treatment to racial minorities because of underrepresentation in the work force. 42 U.S.C. §2000e-2(j). Rather, Congress left such preferential programs within the realm of acceptable voluntary practices. Indeed, a good faith attempt to voluntarily eliminate underrepresentation of minorities in the skilled craft positions furthers the ends Congress sought to achieve in enacting Title VII without the need for mandatory government regulation.* Title VII was meant to eliminate the underrepresentation of minorities in the work place and in the skilled trades and not as an instrument to further such underrepresentation on the pretext of reverse discrimination. In fact, training programs such as those at petitioner Kaiser and the one administered by amicus tend to benefit white workers by making training programs available to them where none would have existed otherwise.

If this Court affirms the decision below, voluntary Union-management affirmative action training programs will have

* Executive Order 11246 and EEOC Affirmative Action Guidelines. As stated by the Executive Board of the Federal Government in EEOC's Affirmative Action Guidelines, the purpose of Title VII is to "improve the social and economic conditions of minorities and women" through "voluntary action".

been struck a fatal blow as:

1. Employers and union will only be able to implement such programs if they admit the existence of racial discrimination in violation of Title VII at their work place. Such an admission would be embarrassing and would subject the employer and possibly the union to lawsuits and possible financial liability. Under such circumstances, employers would be reluctant to voluntarily agree to affirmative action programs;

2. If the employer and the union did implement a voluntary affirmative action training program without an admission of racial discrimination, it would subject them to Weber type reverse discrimination suits.

This would place unions and employers who wished to engage in good faith voluntary affirmative action programs beneath the Sword of Damocles. The result would be that no affirmative action programs would be implemented without EEOC intervention. This would, of course, be costly and defeat the favored policy of private voluntary action in labor-management relations. To create a situation in which only the government and the courts would implement the cherished national policy of the creation of equal employment

opportunities for minorities in the work place would run afoul of both Title VII and of the LMRA. Courts should not hinder the voluntary efforts of labor and management to in good faith correct the results of a society that has in the past denied equal opportunity to minorities. Title VII is not unconscious of race. Title VII is not simply an anti-discrimination statute. It is federal legislation which was enacted to afford minorities equal employment opportunities. Indeed, Title VII was deemed by Congress the Equal Employment Opportunity Act and established the Equal Employment Opportunity Commission. Title VII contemplates and condones voluntary affirmative action. Title VII was not intended to force government to interfere with voluntary good faith efforts of union and management to create equal opportunities for minorities through preferential treatment. The very existence of collectively bargained programs which attempt to further the promotional opportunities of minorities is a tribute to the wisdom of this court in favoring voluntary private resolution of industrial problems. Steelworkers Trilogy, supra. This court should continue this policy by reversing the court below and not interfering with the good faith voluntary attempts of unions and management to clean the Augean stables without Government intervention. If it were not for such efforts, plaintiff Weber would not have even had a training program to apply to in the first instance.

CONCLUSION

Amicus, National Union endorses the basic position adopted by the Affirmative Action Coordinating Center and other participating labor and civil rights organizations that:

1. This country cannot attain true equality of opportunity without affirmative action.

2. Title VII and the anti-discrimination principle must be understood in the context of our nation's history of discrimination against non-white people and women and its resulting national patterns of underrepresentation and inequality in the workforce.

3. As stated by the Executive Branch of the federal government in the EEOC's Affirmative Action Guidelines, the purpose of Title VII is to "improve the social and economic conditions of minorities and women" through "voluntary action".

4. Title VII and the anti-discrimination principle should not exclusively be a search for villains and villainous acts; on the contrary, the focus should be on current unequal conditions and providing mechanisms for their elimination.

5. We know that the cure to discrimination against non-white people and discrimination against women are

inextricably linked.

6. We endorse voluntary action on the part of employers and unions to redress the national patterns of discrimination addressed by Title VII and Executive Order 11246 and realize that this objective cannot be achieved if employers and unions must first expose themselves to charges that they are violating the very laws they are seeking to implement.

7. From our experience we know that in many instances "employment tools which recognize the race, sex or national origin of applicants and employees" (See Affirmative Action Guidelines) such as those in issue in this case are the logical means by which true equal opportunity can be achieved.

8. Our call for voluntary affirmative action in no way diminishes our support for judicially mandated or administratively required affirmative measures which provide the necessary incentive for voluntary action.

For these reasons and for the reasons set forth in the argument above, the orders of the courts below should be reversed and the complaint dismissed.

Respectfully submitted,

JEROME TAUBER
Attorney for National
Union of Hospital and
Health Care Employees,
RWDSU, AFL-CIO as
Amicus Curiae
380 Madison Avenue
New York, New York 10017

(212) 867-2100

Of Counsel:

SIPSER, WEINSTOCK, HARPER,
DORN & LEIBOWITZ
380 Madison Avenue
New York, New York 10017

SIPSER, WEINSTOCK, HARPER, DORN & LEIBOWITZ
ATTORNEYS AT LAW
380 MADISON AVENUE
NEW YORK, N.Y. 10017
(212) 687-2100

L. PHILIP SIPSER
HARRY WEINSTOCK
BELLE HARPER
RICHARD L. DORN
LEONARD LEIBOWITZ

SIDNEY S. BERMAN
DONALD E. KLEIN
ELMER H. BEBERFALL
JEROME TAUBER
VICKI ERLICH
MICHAEL SCHAPER
MARIANNA DOWNER
SUSAN MARTIN

January 16, 1979

Wade H. McCree, Esq.
Solicitor General
Washington, D.C. 20502
Attorney for United States
of America and Equal Employment
Opportunity Commission

Michael H. Gottesman, Esq.
Bredhoff Gottesman Cohen & Weinberg
100 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for United Steelworkers
of America, AFL-CIO

Michael R. Fontham, Esq.
Stone, Pigman, Walther, Wittman and Hutchison
1000 Whitney Bank Building
New Orleans, La. 70130
Attorneys for plaintiff Weber

Thomson Powers, Esq.
Stepto & Johnson
1250 Connecticut Ave., N.W.
Washington, D.C. 20003
Attorneys for defendants Kaiser Aluminum Co., et al.

Re: Weber v. Kaiser Aluminum Co., et al.

Dear Counsel:

Request is made on behalf of the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, to file a brief amicus curiae in the above-referenced case on behalf of the defendants.

Wade H. McCree, Esq.
Michael H. Gottesman, Esq.
Michael R. Fontham, Esq.
Thomson Powers, Esq. -2- January 16, 1979

The National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, is a labor organization representing over 80,000 employees in the health care industry and a joint manager of a training and upgrading fund whose policies may be affected by the outcome of this case.

Thank you for your consideration of this matter.

Sincerely,

JEROME TAUBER

JT:iat

STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
COUNSELLORS AT LAW

SAUL STONE
PAUL G. H. PIGMAN
EWELL P. WALTHER, JR.
PHILLIP A. WITTMANN
CAMPBELL C. HUTCHINSON
DAVID L. STONE
WILLIAM D. TREEBY
WARREN A. GOLDSTEIN
HIRSCHEL T. ABBOTT, JR.
MICHAEL R. FONTHAM
HARRY M. ZIMMERMAN, JR.
ANTHONY M. GILES
WAYNE J. LEE
CLINTON W. SHINN

JAMES C. GULOTTA, JR.
PAUL L. ZIMMERING
JOHN M. LANGIS
STEPHEN H. KUPPERMAN
JO HARRIET STRICKLER
STEPHEN G. BULLOCK
SARAH S. VANCE

1000 WHITNEY BANK BUILDING
NEW ORLEANS, LA. 70130

AREA CODE 504 TELEX
581-3200 584136

January 18, 1979

OUR FILE NUMBER

Jerome Tauber, Esq.
Sipser, Weinstock, Harper,
Dorn & Leibowitz
380 Madison Avenue
New York, New York 10017

Re: United Steelworkers of America, AFL-CIO-CLC v. Weber, et al, No. 78-432; Kaiser Aluminum & Chemical Corporation v. Weber, No. 78-435; United States of America, et al v. Weber, et al, No. 78-436

Dear Mr. Tauber:

In response to your letter of January 16, 1979, this letter is to inform you that the respondents in these cases have no objection to the filing of a brief amicus curiae on behalf of any party in the Supreme Court of the United States.

Sincerely,

Michael R. Fontham
For STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON

MRF/law